STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

BENJAMIN MICHAEL BENTZ

Defendant-Appellant.
_____/

Supreme Court No. _____

Court of Appeals No. 329016

Lower Court No. 15-2928 FC-S

MICHIGAN ATTORNEY GENERAL/
MASON COUNTY PROSECUTOR
Attorneys for Plaintiff-Appellee
_____

DOUGLAS W. BAKER (P49453)
ADRIENNE N. YOUNG (P77803)
Attorneys for Defendant-Appellant
_____

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

BY: DOUGLAS W. BAKER (P49453)
ADRIENNE N. YOUNG (P77803)
Assistant Defenders
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

TABLE OF CONTENTS

DWB*msc app.docx*28748 February 23, 2017
Benjamin Michael Bentz

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Rules

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The defendant-appellant, Benjamin M. Bentz, appeals from an unpublished opinion of the Court of Appeals issued December 29, 2016 (Attachment 1 to this Application). The Court of Appeals affirmed Mr. Bentz's convictions for first- and second-degree criminal sexual conduct. The convictions were entered after a jury trial in the Mason County Circuit Court at which Judge Susan K. Sniegowski presided. Mr. Bentz now seeks this Court's review.

Mr. Bentz's case raises a number of issues that call for this Court's attention. Each arises from his two claims of ineffective assistance of counsel.

First, his appeal would allow this Court to resolve a conflict among Court of Appeals panels about the circumstances in which MRE 803(4), the hearsay exception for statements made for purposes of medical treatment or diagnosis, allows a physician who conducts a forensic examination of an alleged child-sex-abuse victim months or years after the alleged abuse to repeat the child's allegations at trial, and thus bolster the child's credibility. Here, the alleged victim visited the office of Dr. Simms about a year after the last alleged abuse. Dr. Simms testified about the allegations of abuse told to her by two staff members who'd taken the alleged victim's history. Defense counsel did not object. Mr. Bentz argued in the Court of Appeals that counsel should have objected because (i) the statement was not truly for purposes of treatment or diagnosis under Rule 803(4), and (ii) because the doctor's testimony about what her staffers told her was an additional level of hearsay not subject to any exception. The Court disagreed, ruling that Rule 803(4) permitted both levels of claimed hearsay. Other panels of the Court have viewed the first point differently and ruled that a child's statement to a physician made months or years after the alleged abuse under circumstances suggesting that the purpose of the exam is forensic,

not truly medical, do not fit the exception. See the *Shaw* and *Qureshi* decisions cited at page 13 of this application. The Court's intervention is needed to resolve this conflict.

The Court's intervention is also needed to bring attention to another, recurring problem. Dr. Simms also testified that the alleged victim had suffered "probable pediatric sexual abuse" based not on any physical corroboration for the child's complaints but instead on her assessment of the child's credibility. Dr. Simms has given nearly identical testimony in at least five other cases, and another physician has done the same in a sixth. In keeping with this Court's precedents (see the discussion at pp 9-11 of this application), the Court of Appeals has on each occasion ruled the testimony improper. Yet the problem persists. This Court's attention is needed.

This appeal would also serve the important purpose of clarifying, where ineffective-assistance is claimed, the extent of the presumption of legitimate trial strategy. The Court of Appeals panel here agreed that Dr. Simms's "probable pediatric sexual abuse" testimony was improper, but could not agree about whether trial counsel could be faulted for not objecting. The majority ruled that Mr. Bentz failed to meet his burden to show counsel did not "cho[o]se to refrain from objecting to the testimony as a matter of trial strategy," because "[i]t is conceivable that defense counsel's choice to emphasize the lack of physical evidence on cross-examination rather than object initially to the testimony was a matter of trial strategy." Opinion at 3. Judge Borello, concurring, disagreed, and would have held that trial counsel performed deficiently by not objecting.

The majority's analysis ignored that counsel could have both objected *and* "emphasized the lack of physical evidence on cross-examination." It also propounded the questionable logic that a lawyer might reasonably choose to allow an error to occur in hopes of minimizing it—a

strategy no more reasonable than that of a doctor choosing to treat an illness rather than prevent it in the first place.

Mr. Bentz asks the Court to grant leave to appeal or, alternatively, for appropriate peremptory relief.

STATEMENT OF QUESTIONS PRESENTED

I. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER EXPERT TESTIMONY THAT THE COMPLAINANT SUFFERED "PROBABLE PEDIATRIC ABUSE," AS WELL AS TO THE EXPERT'S HEARSAY ACCOUNT OF THE COMPLAINANT'S ALLEGATIONS?

Trial Court made no answer.

Defendant-Appellant answers, "Yes."

II. WAS TRIAL COUNSEL INEFFECTIVE FOR FAILING TO IMPEACH THE COMPLAINANT BASED UPON HER INCONSISTENT TESTIMONY THROUGHOUT VARIOUS PRE-TRIAL INTERVIEWS AND PROCEEDINGS?

Trial Court made no answer.

Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Defendant-appellant Benjamin Michael Bentz stood trial in Mason County Circuit Court on four counts of criminal sexual conduct in the first degree (CSC-I), MCL 750.520b(1)(a), and one count of criminal sexual conduct in the second degree (CSC-II), MCL 750.520c(1)(a). A jury convicted him of each charge. Judge Susan K. Sniegowski presided over the trial and later sentenced Mr. Bentz to serve concurrent twenty-five-to-seventy-five-year prison terms for each count of CSC-I, and a consecutive seven-to-fifteen-year prison term for CSC-II.

Mr. Bentz appealed by right to the Court of Appeals. On December 29, 2017, in an unpublished opinion per curiam (Attachment 1), the Court affirmed his convictions and sentences.

He now seeks this Court's review and raises the same two issues that he raised in the Court of Appeals. He argues first that trial counsel was ineffective for failing to object to the prosecution expert's testimony that amounted to an opinion that the complainant's story was credible, as well as the expert's hearsay repetition of the complainant's allegations. Second, he argues that trial counsel was ineffective for failing to impeach the complainant, Audrey Bentz, with important inconsistencies in her story.

****

Benjamin Bentz married Michaeleen Bentz in 2001.[1] Michaleen and Benjamin had two children together: Tristan, now 13-years-old, and Audrey, now 11-years-old. From November 2011 to October 2013, Mr. Bentz was their primary caregiver because Michaeleen was incarcerated at Mason County Jail six times, once for over seven months.

The evening of July 25, 2014, Michaeleen and Benjamin got in an argument that eventually became violent. PSIR, 3. As a result, Michaeleen talked to her children, Audrey and

[1] Mr. Bentz' PSIR lists his current marital status as separated.

Tristan, about the possibility of leaving the family home. *Id*. During that conversation, Audrey told her mother that her dad had molested her three or four times, most recently about a year before. PSIR, 4 (quoting Leasa Patterson's paraphrased report for CPS).[2].

The next day, Michaeleen took Audrey to the emergency room and while at the hospital, Michaeleen spoke to Ludington Police Department on Audrey's behalf. PSIR, 2. That same day, the police called Mason County Child Protective Services worker, Leasa Patterson, who met with Audrey at the police station. PSIR, 3. Audrey described the alleged abuse to Ms. Patterson as follows:

> The first time was approximately 2 years ago, during the school year before Thanksgiving but after Halloween. ...[H]er dad came in her bedroom and rubbed her side and then he "inserted private in her backside." She later reported that it lasted a ½ hour and he didn't push. …CPS asked her if anything hurt and she reported that her stomach did so she took an aspirin. CPS asked Audrey if she screamed when it was happening and she replied, "No." …Audrey reported that the second time it happened was last summer when her mom was in jail and her brother was sleeping…he [] "licked my backside, put his private in me and pushed for 15 minutes." Audrey then reported that the 3rd time that it happened was sometime in the middle of last summer. …Audrey then reported that the fourth time that it happened was the Saturday before she started 4th grade.

PSIR, 4.

About a month later, on August 20, 2014, Audrey was examined by a physician at DeVos Children's Hospital in Grand Rapids. Audrey's exams from that day were normal but the overall assessment by the examining physician was "probable pediatric abuse" based upon the history that Audrey provided. Jury Trial 6/4/15 (Vol II), 24.

Mr. Bentz was arrested on November 7, 2014.

On January 7, 2015, Audrey testified at the preliminary exam to four incidents of sexual abuse:

[2] Tristan denied any abuse by his father and did not believe Audrey when she told him about this alleged abuse earlier.

Q. Would it be the summer between your third and fourth grade?
A. Part of it.
Q. Can you tell the judge what happened?
A. My dad sent me to bed the first time. An hour or two later, he came into my bedroom, rubbed my side, said my name, went out, came back in, rubbed my side, pulled my pants down…
Q. What happened after your pants were pulled down?
A. He put his penis into my anus.
PE, 10.

Q. What happened on the second instance?
A. He sent me to bed, he was drinking that night. He came into my bedroom, rubbed my side again, and then he said my name, went out, came back in, rubbed my side again, and before he came back in he went toward our dining room, bathroom, and kitchen and the laundry room, and then he came back and I was playing my DS. I had my DS under my pillow, it was still on when he went out—
PE, 12.
***
Q. So what did you do with the DS system when your father came in your bedroom?
A. I hid it under my pillow so that I wouldn't get in trouble.
Q. Then what happened after you hid it under your pillow?
A. Then he came in, rubbed my side, and then said my name, went out and then when he went out I powered it off, and just slid it under my dresser. And then he came in, when he came back in he rubbed my side, pulled my pants down and did what he did the first time to me again…inserted his penis in my anus…Then he was there for a couple minutes and then he went out. And I woke up and got on my game system again.
Q [from the Court]: Audrey, was that the same time period, that same summer?
A [from Audrey]: Yes, sir.
PE, 14.

Q. Was there another time?
A. Yes, sir.
Q. And when did that take place?
A. Last year.
Q. Would that have been the same summer or different summer?
A. Different summer.
***
Q. …What happened that time?
A. Rubbed my side, said my name, I didn't move because it was late and I didn't want to get in trouble, pretended I was sleeping all times, then he went out, came back in, and when he came back he pulled

> my pants down, licked my backside, referring to my anus, and then put his penis into my anus.
> PE, 14.
> ***
> Q. What happened after he inserted his penis into your anus?
> A. He was in there for a couple minutes with it inside of me and then he pulled my pants up, then his and then he went out.
> PE, 15.
>
> Q. Did it happen another time?
> A. Yes, sir. I do believe so.
> ***
> Q. What happened?
> A. He came in, rubbed my side, said my name, and then he went out, came back in, pulled my pants down, pulled his pants down, inserted his penis into my anus.
> Q. And then what happened?
> A. He was in there for a couple minutes, pulled my pants up, pulled his pants up, went out.
> PE, 15.

Audrey testified that during every incident, her older brother, Tristan, was home but asleep. On cross-examination, Audrey testified that the first two incidents lasted 15 minutes but and that she felt a little pain "in her butt." PE, 20. Audrey also stated that during one of the incidents, she could not recall which, her dad "just touched" her vagina with his finger. PE, 26. Audrey could not remember when the last two incidents took place: if it was during the school year or during the summer. PE, 24. However, Audrey did recall that after the fourth incident her father told her not to tell anybody. PE, 29.

At trial, Audrey also said that she was playing with her DS system during the first incident, rather than the second. Vol I, 165. Audrey testified only that she was "eight and nine" during the incidents and did not provide any specifics as to timing. Vol I, 164. In fact, Audrey did not know when the second incident took place in relation to the first incident, despite her explanation to the Court at the preliminary examination that the first two incidents occurred during the same summer. Vol I, 168. However, moments later, Audrey testified "I do believe I

was in school" when the second incident took place. Vol I, 170. Audrey could not recall when the third and fourth incidents took place, only that she was nine-years-old during the fourth incident. Vol I, 172. For the first time, she could recall that her father was allegedly drinking the night of the third incident. Vol I, 171.

Dr. Debra Simms, Audrey's examining physician from DeVos Children's Hospital, testified that Audrey's "physical examination was normal. It doesn't show any effects of any kind of sexual assault." Vol II, 24. Nevertheless, Dr. Simms testified that her "overall assessment was probable pediatric sexual abuse," based upon "the history and the physical examination of Audrey." Vol II, 24. Defense counsel did not object. Nor did counsel object when Dr. Simms told the jury what Audrey told hospital staffers Cara and Jenny about the alleged sexual assaults. Vol II, 23-24.

The officer-in-charge of the investigation (Vol I, 7), Detective J.B. Wells, established the dates of the six occasions Michaeleen Bentz spent time in jail (Vol II, 88).

Also testifying for the prosecution was Tom Cottrell, the vice president of counseling services at the YWCA of West Central Michigan (Vol II, 44) and an expert on "child sexual abuse dynamics" (Vol II, 48).

Testifying for the defense were Amanda Howe, Jessica Sanders, and Audrey's paternal grandmother Margaret Pucilowski—all of whom had extended stays at the family home while Michaeleen was in prison, and none of whom had ever noticed any signs of abuse or overheard anything out-of-the-ordinary during their stays.

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO IMPROPER EXPERT TESTIMONY THAT THE COMPLAINANT SUFFERED "PROBABLE PEDIATRIC ABUSE," AS WELL AS TO THE EXPERT'S HEARSAY ACCOUNT OF THE COMPLAINANT'S ALLEGATIONS.

Dr. N. Debra Simms, a child abuse pediatrician, was both the complainant's examining physician and a prosecution expert witness. Dr. Simms performed a full examination of the complainant and found no physical evidence to corroborate the complainant's allegations. Nevertheless, the doctor, an expert in "child abuse and neglect pediatrics," Vol II at 10, opined that the complainant was probably telling the truth:

> Q [by the prosecutor]: …What was your overall assessment, though, in this case?
>
> A [by Dr. Simms]: My overall assessment was probable pediatric sexual abuse.
>
> Q: And upon what did you base that on?
>
> A: Upon the history and the physical examination of Audrey.
>
> Q: The physical examination was normal. It doesn't show any effects of any kind of sexual assault. How can that be?
>
> A: …So, so for penile-anal penetration that she was alleging, the fact that I had a normal exam did not preclude a diagnosis of abuse. Oral-anal contact would not be expected to give me any type of damage to that area. Touching of the hand to the genital area, I did not expect to see any type of damage or residua of trauma.
>
> In terms of her history, between the caregiver's history, the history to the authorities during her forensic interview, and then her history with us at our medical evaluation, she had been clear, consistent, detailed, and descriptive. And my diagnosis was probable pediatric sexual abuse.

Vol II, 27-30.

Trial counsel did not object.

On cross-examination, Dr. Simms again emphasized Audrey's own story as the key component of the diagnosis:

> Q [by trial counsel]: So it's possible—possible—that based on the physical that she was not abused. Is that correct?
>
> A [by Dr. Simms]: If no history were taken, no background history or information like that, the – just—just looking at the child she was normal.
>
> Q: So looking at the child—
>
> A: Just looking at her, she was normal.
>
> Q: —there'd be no evidence of abuse, okay. Is that what you're saying?
>
> A: Yes, sir.

Vol II, 36.

Moreover, without defense objection, Dr. Simms repeated the "history" given by the complainant to her staff:

> Audrey had stated that she was at our office and had come to see the doctor because "my dad touched me," was the quote.
>
> And when asked to explain what that meant, Audrey had stated, "He put his private into my backside."
>
> "Private" meant his penis, and "backside" she defined as "butt."
>
> And she stated that this had occurred four times. The last time was approximately a year before our examination.
>
> And she stated that "he used his fingers to touch my front side."
>
> She stated "front side" meant her "private," which she had—that's the name for her genitals.
>
> And she also stated that his fingers would go insider her private and that he would put his tongue on her backside, or her butt, and she did not allege that anything had [ ] put on his penis, and that she stated that she didn't have any other worries about her body.
>
> In conversation, she provided other details, such as she went to the bathroom or he said she could have the dog or different things.

Vol II, 23-24.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo under the two-part *Strickland* test described in the argument that follows. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Ineffective claims present mixed questions of fact and law. *Strickland*, 455 US at 698; *People v LeBlanc*, 465 Mich 575, 579 (2002). Questions of law are reviewed de novo. *LeBlanc*, *supra*. Questions of fact are reviewed for clear error. MCR 2.613(C); *LeBlanc*, *supra*.

Unpreserved errors are reviewed under the test for plain error set forth in *People v Carines*, 460 Mich 750 (1999).

Argument

The doctor's testimony that the complainant was a "probable" victim of sexual abuse was highly improper. MRE 702 provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Witnesses, expert or otherwise, are not free to comment on the truthfulness of other witnesses, or, worse, to invade the jury's province by stating their opinion of the merits of the charges at issue. *People v Izzo*, 90 Mich App 727, 730 (1979); *see People v Buckey*, 424 Mich 1, 7 (1985); *People v Dobek*, 274 Mich App 58, 70-71 (2007). Testimony on the veracity of the complainant's accusations that comes from a governmental, or, as here, expert witness testimony is particularly harmful because a jury is all the more likely to defer. *See People v Smith*, 425 Mich 98, 112-113 (1986); *People v McGillen* #2, 392 Mich 278, 285 (1975); *People v Izzo*, 90 Mich App 727 (1979). It is for the jury, not other witnesses, to determine witness credibility.

A child sex-abuse expert in a child sex-offense prosecution has a particular obligation to steer clear of stating an opinion that sexual abuse occurred or vouching for the complainant's credibility. *People v Peterson*, 450 Mich 349, 352 (1995), *mod* 450 Mich 1212 (1995); *Dobek, supra*. Where the expert witness is the examining physician, as she was here, in a sexual assault case the witness is proper so long as her "testimony may assist the jury in their determination of the existence of either of two critical elements of the offense charged, (1) penetration itself and (2) penetration against the will of the victim." *People v Smith*, 425 Mich 98, 107 (1986) (quoting *People v McGillen #2*, 392 Mich 278, 284 (1974)). Further, an examining physician's opinion that sexual abuse in fact occurred shall be limited to "findings within the realm of [] medical capabilities or expertise" and not on "the emotional state of, and the history given by, the complainant" because that is "in effect, an assessment of the victim's credibility." *Id.* at 112-113.

Dr. Simms, with the prosecutor's encouragement, did exactly what *Smith* forbids: she vouched for the complainant's credibility, and in the process implied that the charged abuse occurred and that the defendant was guilty. The doctor's diagnosis was used to signal the doctor's acceptance of the complainant's allegations as truthful. As the prosecutor explained, the doctor found Audrey's story-telling "clear, consistent, and coherent."[3] The message was plain: Dr. Simms thought the allegations truthful, and so should the jury. "Such statements are considered 'superfluous' and are 'inadmissible lay witness [] opinion on the believability of a [witness's] story' because the jury is 'in just as good a position to evaluation the [witness's]

[3] The prosecutor pointed to Dr. Simms' credibility assessment as support for a guilty verdict in opening and closing. "Dr. Simms will also testify as an expert witness. And I believe that she will testify that a normal physical exam like that is consistent with Audrey's report of sexual abuse." Vol I, 153. Again, in closing: "And as Dr. Simms stated, even though the medical examination a year after the fact showed no scarring, bruising, cuts, that that was really not a surprise….And that [Audrey's] clear, consistent, and coherent report of sexual abuse at the hands of her father made this a case of probable child sexual abuse." Vol II, 173.

testimony.'" *People v Musser*, 494 Mich 337, 349 (2013) (quoting *People v Smith*, 425 Mich 98, 109 (1986)).

Nor was Dr. Simms's endorsement of the complainant's credibility proper because her "diagnosis of 'probable pediatric abuse' was not premised on the victim's believability, but on objective factors assessed from A.B.'s medical history": "clarity, consistency, detail, and descriptiveness." See the prosecution's Court of Appeals brief at 14-15. This argument misapprehends the applicable precedents. *People v Smith* explained that a physician may not state her opinion that the complainant is believable based on nothing more than her assessment of the complainant's version of events. *Smith*, 425 Mich 98, 109, 112 (1986). Where penetration is at issue (as here) the physician may of course base her opinion on physical findings that suggest penetration was accomplished. *Smith*, 425 Mich at 113-15. But where no such physical findings exist (as here) the physician is not free to testify that, as in *People v McGillen #2*, her "findings" were nonetheless "consistent with . . . the [complainant's] history," or, as in *Smith*, to baldly state her opinion that "the victim had been sexually assaulted." *Smith*, 425 Mich at 109, 113. "Because it is the province of the jury to determine whether 'a particular witness spoke the truth or fabricated a cock-and-bull story,' [*United States v Bailey*, 444 US 394, 414-15 (1980)], it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *People v Musser*, 494 Mich 337, 349 (2013). The physician is not a "human lie detector." *People v Dobek*, 274 Mich App 58, 70 (2007). Assessing credibility is beyond her expertise. Her opinion about credibility is therefore inadmissible, "because the jury is 'in just as good a position to evaluate the [witness's] testimony.'" *Musser*, 494 Mich at 349, quoting *Smith*, 425 Mich at 109.

The precedents thus make clear that a medical expert must steer clear of stating an opinion of "probable pediatric sexual abuse" based not on any physical findings, but instead only on her assessment of the complainant's version of events. It does not matter that the expert might point to "objective"[4] reasons for believing the complainant's story. Those reasons do not make the doctor a credibility expert. Because in the absence of such expertise "the jury is 'in just as good a position to evaluate the [witness's] testimony,'" her credibility assessment is inadmissible.[5] *Id*.

That the prosecution's analysis is misguided finds further support in the Court of Appeals' precedents. On at least four other occasions the Court has ruled that evidence just like that in question here—testimony by Dr. Debra Simms that a complainant had suffered "probable pediatric sexual abuse" in the absence of any physical findings—was improper and inadmissible. *See People v Gresham*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 293580) (Attachment 2); *see also People v Chevis*, unpublished opinion per curiam of the Court of Appeals, issued Oct. 8, 2013 (Docket No. 304358) (Attachment 3); *People v Spayde*, unpublished opinion per curiam of the Court of Appeals, issued Sept. 29, 2011 (Docket No. 294300) (Attachment 4); *People v Jackson*, unpublished opinion per curiam of the Court of Appeals, issued April 29, 2010 (Docket No. 283092) (Attachment 5). Trial counsel was ineffective for not objecting. The state and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US

[4] The "objective factors" mentioned by the prosecution are not really objective at all. Whether a statement is clear, consistent, detailed, or descriptive is of course a matter of opinion that might vary from listener to listener. In other words, such considerations are subjective.

[5] The jury of course might properly look to the reasons mentioned—clarity, consistency, detail, and descriptiveness (to the extent they find support in the record)—when evaluating the complainant's account for itself. But it should be the jury weighing those factors. The jury should not defer to, be influenced by, or even exposed to another's assessment.

Const AM VI, XIV; Const 1963, art 1, §20. The test for determining ineffective assistance is twofold: whether "counsel's performance was deficient," and if so, whether his "deficient performance prejudiced the defense." *People v LaVearn*, 448 Mich 207, 213 (1995) (quoting *Strickland v Washington*, 466 US 668, 687 (1994)). Counsel's performance is deficient if it falls "below an objective standard of reasonableness under prevailing professional norms." *People v Stanaway*, 446 Mich 643, 687 (1994). The defendant is prejudiced where "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Stanaway*, 446 Mich at 698-88; see also *People v Pickens*, 446 Mich 298, 314, 326 (1994) (adopting *Strickland* prejudice standard as a matter of state constitutional law).

A lawyer performs deficiently in a child sex-abuse case by not objecting to opinion testimony that improperly vouches for the complainant's credibility. Here, Dr. Simms improperly vouched for the complainant's credibility when she testified not based on any physical findings but only her assessment of the child's statement that the child had suffered "probable pediatric abuse." See *Gresham*, supra (Attachment 2) (where expert diagnosis of "probable pediatric sexual abuse" was "predominately based on the statements of the victim, and in absence of any medical findings or physical evidence of sexual abuse," such "testimony amounted to an improper vouching of the veracity of the victim," and so "counsel's failure to object fell below an objective standard of reasonableness").

It was also deficient performance for counsel not to object when Dr. Simms told the jury what the complainant told her staff about the events in question. The doctor's conversation with the complainant came too late for the complainant's account to be admitted under the hearsay exception for statements made for purposes of medical treatment or diagnosis. Admissible exceptions to the hearsay rule include "[s]tatements made for purposes of medical treatment or

medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment." MRE 803(4); *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). "The rationale supporting the admission of statements under this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care." *People v Garland*, 286 Mich App 1, 8-9; 777 NW2d 732 (2009). "In cases of suspected child abuse, statements the child makes may be admitted under this exception when the totality of circumstances surrounding the statements supports that they are trustworthy." *People v Duenaz*, 306 Mich App 85, 95; 854 NW2d 531 (2014). But where the examination occurs long after the last alleged incident of sexual abuse and after the child complainant has already spoken to the police and child protective services, a statement made during that exam is not made for the purpose of medical treatment or diagnosis and is not, under the totality of the circumstances, trustworthy enough to be admitted. *People v Shaw*, 315 Mich App 668, ___ (2016); see also *People v Qureshi*, unpublished per curiam opinion of the Court of Appeals issued January 5, 2016 (Docket No. 323247) (Attachment 7) (where doctor's examination took place seven months after alleged incident and reports had already been made to CPS and police agent, "complainant's statements were meant to further the investigation and were not for medical diagnosis").

Here, the medical examination came even later than in Qureshi—about a year after the last alleged incident. It also occurred over a month after the complainant spoke with CPS and a police agent. Further, Dr. Simms was not actually the individual who took Audrey's history—

Jenny and Cara, the medical assistants, did. Vol II, 23. See MRE 805; Solomon v Shuell, 435 Mich 104, 129; 457 NW2d 669, 680 (1990) ("Under MRE 805, hearsay within hearsay is excluded where no foundation has been established to bring each independent hearsay statement within a hearsay exception."). Nevertheless, when Dr. Simms testified as to Audrey's statements during her exam, defense counsel failed to object.

Moreover, counsel's deficient performance was prejudicial because "there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-88 (1994). The trial was a pure credibility contest, and the case was close. Not only was the complainant's account uncorroborated, despite Dr. Simms's claim to the contrary, the complainant's testimony was, in significant respects, inconsistent. First, the complainant testified that there were four sex acts in all but told her mother and then CPS counselor that there were three or four incidents. PSIR, 4. Second, Audrey testified at trial that all four acts took place when she was eight or nine, she could not recall when but thought that at least one incident was while she was in school. Vol I, 165-170. However, Audrey testified at the preliminary examination that all four acts occurred during two different summers. That, too, was different than what she shared with her CPS worker:

> The first time was approximately 2 years ago, during the school year before Thanksgiving but after Halloween. ...[H]er dad came in her bedroom and rubbed her side and then he "inserted private in her backside." She later reported that it lasted a ½ hour and he didn't push. …CPS asked her if anything hurt and she reported that her stomach did so she took an aspirin. CPS asked Audrey if she screamed when it was happening and she replied, "No." …Audrey reported that the second time it happened was last summer when her mom was in jail and her brother was sleeping…he [] "licked my backside, put his private in me and pushed for 15 minutes." Audrey then reported that the 3rd time that it happened was sometime in the middle of last summer. …Audrey then reported

> that the fourth time that it happened was the Saturday before she started 4th grade.

PSIR, 4. Finally, the complainant changed her testimony about whether her father actually penetrated her with his finger(s), PE, 38, and how long penetrations lasted, her accusations ranging from a couple minutes to an hour. PE, 31.

In the alternative, the error, because it was both obvious and prejudicial, warrants reversal under the plain-error rule. See *People v Carines*, 460 Mich 750, 763 (1999).

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO IMPEACH THE COMPLAINANT BASED UPON HER INCONSISTENT TESTIMONY THROUGHOUT VARIOUS PRE-TRIAL INTERVIEWS AND PROCEEDINGS.

Standard of Review:

Whether the defendant received the effective assistance of counsel guaranteed him under the United States and Michigan Constitutions is a mixed question of fact and law. This Court reviews for clear error the trial court's findings of fact in this regard, and reviews de novo questions of constitutional law. *People v Ackley*, 497 Mich 381, ___ (2015); *People v Trakhtenberg*, 493 Mich 38, 47 (2012).

Argument:

Counsel's failure to make use of available materials that would have advanced the defense theory and impeached the complainant's version of events amounted to ineffective assistance of counsel. The state and federal constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const Am VI, XIV; Const 1963, art 1, §20. The test for determining ineffective assistance is twofold: whether "'counsel's performance was deficient,'" and if so, whether his "'deficient performance prejudiced the defense.'" *People v LaVearn*, 448 Mich 207, 213 (1995) (quoting *Strickland v Washington*, 466 US 668, 687 (1984)). Counsel's performance is deficient if it falls "below an objective standard of reasonableness under prevailing professional norms." *People v Stanaway*, 446 Mich 643, 687 (1994). The defendant is prejudiced where "there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Stanaway*, 446 Mich at 687-88; see also *People v Pickens*, 446 Mich 298, 314, 326 (1994) (adopting *Strickland* prejudice standard as matter of state constitutional law).

A. COUNSEL PERFORMED DEFICIENTLY BY NEGLECTING IMPORTANT IMPEACHMENT MATERIAL.

The first prong is met. Counsel performs deficiently "if counsel unreasonably fails to develop the defendant's defenses by adequately impeaching the witnesses against the defendant." *People v Lane*, 308 Mich App 38, 68 (2014) (citing *Trakhtenberg*, 493 Mich at 54-55). Counsel did exactly that here. He had a number of resources available to serve his defense, but neglected to use them.

First of all, counsel neglected to point out that that the complainant was inconsistent about when the alleged sex acts occurred and how many occurred. Audrey started off by reporting to her mother and a CPS worker that three or four incidents took place. She was certain when she talked to the CPS worker that the first incident was in October of her 3rd grade year, "before Thanksgiving but after Halloween." PSIR, 4. But then at the preliminary exam, Audrey said that first two incidents occurred in the summer time. By the time trial came about, Audrey could only state that she was eight or nine years old when the alleged acts, now four, took place. Vol I, 165-170. Yet counsel never asked about these obvious inconsistencies, and so this important information was never brought to the jury's attention.

The same CPS interview could have been used to impeach other aspects of Audrey's story as well. In fact, a different attorney at pretrial made the exact point that trial counsel should have raised:

> Counsel: But you told in the interview with Miss Patterson that he licked your butt and put his privates in your backside and had his privates in you for about an hour. So was it a couple minutes or an hour?
> Witness: Couple minutes.
> Counsel: Why did you tell Miss Patterson it was an hour?
> Witness: I don't know.
> Counsel: Do you remember if that actually occurred? I mean there's a big difference between a couple minutes and a—and an hour.

> Witness: Yes, sir.
> Counsel: So do you – so which one was it a couple minutes or an hour?
> Witness: Couple minutes.
> Counsel: So you can't explain why you told – told during your forensic interview that it was an hour?
> Witness: No, sir.
> Counsel: Did you lie to them?
> Witness: No, sir.
> Counsel: You did or you didn't?
> Witness: Yes, sir.
> Counsel: You did lie to them? What did you lie to them about?
> Witness: It being an hour.
> ***
> Counsel: And you don't remember if – if this happened while you were in school or during the summer?
> Witness: No, sir.

Audrey was inconsistent about the key elements of her claims: when they took place, how many times something happened, and how long each incident lasted. And yet, trial counsel did not bring any of these inconsistencies to the attention of the jury.

B. THE NEGLECTED MATERIAL WOULD HAVE ADVANCED THE DEFENSE STRATEGY.

Nor could there be legitimate strategic reason for counsel's neglect. The defense to the CSC-I charges was that they simply did not happen. Defense counsel's strategy was to persuade the jury that Audrey was making this story up, perhaps as a result of a recognized rocky relationship between Audrey's parents, one that was leading her mom to leave the family home. The key to this defense strategy was to convince the jury that there was a reasonable doubt that Mr. Bentz committed the crimes for which he was accused. Toward that end, counsel questioned a change in Audrey's story—from telling her doctor and/or CPS that she felt pain in her stomach, to then testifying at preliminary exam and trial she felt pain her anus after these incidents. TII, 190-191:

> Counsel: By you didn't—you didn't feel it was worth mentioning to the doctor initially?
> Witness: No.
> Counsel: You didn't feel it was worth mentioning to the CPS initially?
> Witness: No.
> Counsel: The police?
> Witness: No.
> Counsel: Your mom.
> Witness: No.
> Counsel: Your brother.
> Witness: No.
> Counsel: Okay. But after you were prepared for your testimony that day, suddenly that came out. Is that correct?
> Witness: Yes.

This cross-examination of the witness indicates (1) that trial counsel was willing and able to impeach the complainant and (2) that trial counsel was familiar with the preliminary examination testimony. Yet, he made no use at all of the most important impeachment weapons at his disposal. No reasonable strategic consideration could explain counsel's failure to make use of the very weapons most useful in advancing the defense theory he chose to pursue. See *Trakhtenberg*, 493 Mich at 54-55; *Lane*, 308 Mich App at 68.

C. IT IS REASONABLY PROBABLE THAT COUNSEL'S MISTAKE AFFECTED THE JURY'S VERDICT.

Moreover, the second prong is also met. It is reasonably probable that had counsel made use of the powerful impeachment material at his disposal, the jury would have had reasonable doubt about the veracity of Audrey's accounts. Audrey's trustworthiness would have been an acute concern to the jury had Audrey herself been impeached by defense counsel and her examining physician's testimony, supra, objected to. In other words, it is reasonably probable that counsel's failure was the difference between a non-guilty verdict and a guilty one.

Counsel was ineffective. The remedy is retrial.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant leave to appeal or appropriate peremptory relief.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

/s/ Douglas W. Baker

BY:_____

DOUGLAS W. BAKER (P49453)
Assistant Defender

ADRIENNE N. YOUNG (P77803)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Dated: February 23, 2017

****

PROOF OF SERVICE

I hereby certify that on February 23, 2017, I electronically served the accompanying application on opposing counsel, Assistant Attorney General Christopher M. Allen, by including his name on the list of TrueFiled recipients; and that by regular mail I served a notice of filing the application with the clerks of the Court of Appeals and the trial court.

/s/ DOUGLAS W. BAKER (P49453)
Assistant Defender
State Appellate Defender Office
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833